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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 - 12th Street, SW
Washington, DC 20554

Re: *WT Docket No. 05-287 -- Alltel Corporation Petition for Limited Waiver*

Dear Ms. Dortch:

Alltel Corporation ("Alltel") respectfully submits this *ex parte* presentation in support of its request for waiver of the 95 percent E911 compliant handset penetration rule, 47 C.F.R. § 20.18(c)(1)(v).¹ Alltel updates the record and reiterates certain critical facts herein and confirms that the Commission must use an objective, "good faith/diligent efforts" test in applying its waiver standard to the pending requests for relief of the December 31, 2005 date. As demonstrated below, Alltel's waiver warrants relief.

At the outset, Alltel stresses that the 95 percent rule is inexorably tied to consumer choice. Ultimately, it is the consumer's decision as to whether and when to replace an existing handset. In this fundamental way, it is unlike any of the earlier E911 benchmarks where compliance was largely within a carrier's control. Alltel met or largely exceeded each of those benchmarks. A carrier cannot ensure compliance with the 95 percent benchmark via its own efforts regardless of how committed it is, how much money it spends, or the particular efforts it undertakes. Instead, compliance with the 95 percent rule is tied to circumstances beyond a carrier's control – namely, the willingness of its customers to upgrade handsets and to do so on a timely basis for FCC compliance purposes. Where compliance with a rule is outside a carrier's direct control and rather based upon predicted market outcomes that are not ultimately borne out, the Commission must apply a reasoned waiver standard and give individual requests for waiver a "hard look."

I. Update to the Record

Alltel's Current Penetration Rate. Alltel reports here that 90.5 percent of its customers have E911 Phase II compliant handsets as of September 30, 2006, up from 87.4 percent as of June 30, 2006. As previously reported, handset turnover within Alltel's customer base

¹ Alltel Corporation Petition for Limited Waiver, WT Docket No. 05-287 (filed Sept. 30, 2005) ("*Petition*").

increasingly involves replacing one compliant handset with another, and the pool of non-compliant handsets are held by subscribers (“non-compliant customers”) who, in many cases, adamantly resist replacing their handsets. Nevertheless, Alltel expects that 95 percent of its customer base will have compliant handsets by June 2007.

Alltel’s Unique Circumstances – The Nature of Its Non-Compliant Customer Base.
Alltel’s inability to comply with the December 31, 2005 date is directly attributable to the characteristics of its customer base and these customers’ particular preferences and usage patterns. As demonstrated in the record and discussed further below, Alltel’s non-compliant customers, for the most part, are not interested in upgrading their handsets – despite barrier-free offers on compliant handsets and significant marketing and E911 education campaigns that have been lauded by APCO and many PSAPs. Alltel will, however, reach the 95 percent benchmark, just not within the Commission’s timeframe. Of relevance here, the December 31, 2005 date for the 95 percent rule was “not specifically tailored” for Tier II or Tier III carriers or “embodied in individual compliance plans,” and the Commission made clear that “[w]e expect to take these factors into account in assessing any waiver requests.”²

Alltel is a Tier II carrier – but like Tier III carriers, its geographic coverage is predominantly rural and it serves a significantly rural customer base. Alltel has previously documented that a significant percentage of its non-compliant customers are out-of-contract, low-usage subscribers.³ Alltel research reflects that more than 85 percent of Alltel’s non-compliant customers are below its average customer’s minutes of use (“MOU”) – and 66 percent have an average MOU *less than one-third of the average customer’s MOU*. Further, these customers are typically long-term subscribers – a vast majority are out-of-contract and they make up a small percentage of Alltel’s customer churn. Alltel has also found that these customers rely on wireless service almost exclusively for voice rather than data applications – likely contributing to their inclination to hold onto their existing handset rather than upgrading, which would require learning a new device that may also contain data capability in which they have little interest.

Recent Alltel research and market trials confirm that these customers are not interested in replacing their handsets. In a June 2006 survey, Alltel customers were asked “How often would you like to upgrade/change your cell phone?”, and 30 percent of its low usage customers answered, “Never.” Further, 40 percent of Alltel’s senior customers (over age 65) who tend to travel but do not use data services responded they would never upgrade or change their phone. As discussed more fully below, in Alltel’s most recent trial for new marketing campaigns to upgrade non-compliant customers’ handsets, Alltel offered compliant phones with effectively no barrier – including no contract obligation – and still less than seven percent of customers chose the offer.

² *Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems et al.*, Order, 18 FCC Rcd 21838, 21845 (2003) (“*Phase II Waiver Final Order*”).

³ *Petition* at 8-9.

Alltel's Efforts. As demonstrated in the record, Alltel has engaged in numerous and continuing marketing campaigns and E911 education initiatives to encourage non-compliant customers to upgrade their handsets to compliant models. In addition, Alltel has engaged in numerous acquisitions in recent years and has sought to increase the compliant handset penetration rate in these markets.⁴ The scope and complexity of these efforts demonstrate (1) Alltel's concrete and timely efforts to comply with the 95 percent rule, and (2) the progress that Alltel does, in fact, continue to make toward the 95% penetration requirement. By the same token, however, the results further underscore that a carrier's efforts can have only so much impact as customers ultimately decide whether and when to upgrade their handsets. Alltel's efforts – which began well in advance of the December 31, 2005 deadline and continue through today – are well documented in the record and include the following:

- ***Interim Benchmarks.*** Alltel's efforts were not "late to the party." It began deploying compliant handsets a full 11 months before it was required to do so and it met or largely exceeded each of the interim E911 benchmarks. Alltel was in substantial compliance with the 100 percent new digital handset activation requirement six months ahead of that deadline.⁵ The 100 percent new activation requirement was the key benchmark to ensure that carriers are fulfilling the purpose of the rule.
- ***Attractive Offers.*** Well in advance of December 31, 2005, Alltel established a handset upgrade program targeting customers with non-compliant handsets. In November 2004, and each month since February 2005, Alltel has mailed "Service Checkup Letters" to non-compliant customers who are out-of-contract. Alltel has provided discounts for new handsets, in many instances enabling customers to obtain new phones for as little as \$0.99 with a two-year service agreement. Alltel followed up many of these letters with an SMS message to those customers with text-capable handsets.⁶ More than 1,045,000 "Service Checkup" letters were sent in 2004 and 2005, and a total of 109,975 customers upgraded their handsets in response to the letters and follow-up SMS messages. An additional 445,000 letters have been sent so far this year. Alltel also eliminated fees to upgrade handsets in February 2005 and made refurbished compliant handsets available to customers without any contract.⁷
- ***E911-Specific Marketing Campaigns.*** In markets where PSAPs have deployed E911 Phase II, Alltel has launched E911-specific marketing campaigns highlighting the

⁴ Where Alltel acquired GSM/TDMA networks, Alltel expeditiously deployed CDMA network overlays and Phase II solutions, provided CDMA handset vouchers to new subscribers who signed on before the CDMA overlay was complete, and in some cases turned down the legacy network and provided all existing customers with CDMA handset vouchers.

⁵ *Petition* at 4.

⁶ *Petition* at 12-13.

⁷ *Id.*

benefits of E911. Beginning in February 2006, Alltel began sending out two E911-themed contract renewal mailings, “*Don’t wait for an emergency to upgrade your wireless phone*” and “*It’s time for a checkup.*” Alltel has sent more than 350,000 of these letters this year, and a total of 27,700 customers to date upgraded their handsets in response.⁸ Alltel has also initiated specific large market campaigns in North Carolina, Florida, and Nebraska.

- *E911 Education Initiatives.* Through bill inserts, bill messages, in-store displays, and its website, Alltel has highlighted the E911 benefits of compliant handsets and urged customers to take steps to determine whether their handsets are compliant.⁹ Alltel sent more than 874,000 bill inserts and messages in 2005, and more than 3,044,000 have been sent so far this year. In response to Alltel’s request for waiver, APCO commented, “Alltel has taken affirmative steps to encourage its customers to upgrade their handsets, and has highlighted the E9-1-1 benefits of handset replacement.”¹⁰ Indeed, APCO expressly encouraged other carriers to engage in similar undertakings.¹¹
- *Analog Customers/Digital Bag Phones.* Beginning in April 2006 and monthly thereafter, Alltel began a contract renewal program for analog subscribers, notifying them of the availability of the Motorola M800 digital bagphone – a replacement for analog phones that is an E911 compliant device. These letters have been sent to more than 42,000 customers, and a total of 1,856 customers to date have upgraded their handsets in response to these mailings.

Finally, several Commission staff have asked whether customers would be more inclined to upgrade their handsets if offered a free, compliant handset with no contract requirement. In response, Alltel conducted a trial in August 2006 in three Florida markets, Tampa, Tallahassee, and Pensacola. Alltel sent letters to approximately 8,500 out-of-contract customers with non-compliant handsets offering a choice of three certified (refurbished), warranted handsets – two available for \$0.01 and one available for \$20.¹² Less than seven percent of the customers opted for one of the no-contract options – and more customers responded to the campaign instead by choosing to upgrade to other handsets available at promotional prices *with a two-year contract*. The trial reflects that even free (\$0.01), no commitment offers do not spur Alltel’s non-compliant customers to turn in their existing handsets, and a contract requirement does not impose a barrier to handset upgrade campaigns.

⁸ Alltel has sent out fewer E911-specific letters than “Service Checkup” letters because the E911 letters are only sent to customers located in areas where PSAPs are Phase II ready and deployed – as discussed below, just 29.8 percent of the PSAPs in Alltel’s service area are Phase II ready and deployed.

⁹ *Id.*

¹⁰ See Comments of APCO, WT Docket No. 05-287, at 6 (filed Oct. 21, 2005).

¹¹ See *id.* at 4 n.3.

¹² With no contract requirement, the fact that the phone is refurbished is of little relevance.

The State of PSAP Readiness/Likelihood of Public Harm. Ultimately, a compliant handset cannot provide improved E911 capability if the appropriate PSAP is not Phase II ready and deployed. Unfortunately, this is all too often the case, especially for Alltel customers. While NENA reports that 68.3 percent of the nation's PSAPs have some Phase II capability,¹³ just 29.8 percent of the PSAPs in Alltel's service area are Phase II ready and deployed. Thus, in more than 70 percent of the PSAPs areas in the company's service territory, Alltel cannot in good faith promote the E911 benefits of a handset upgrade inasmuch as customers will derive no E911 benefit and there is a risk of public confusion. While Alltel is sympathetic to the constraints that PSAPs operate under and has worked together with PSAPs to deploy Phase II capability in a timely manner,¹⁴ lack of PSAP deployment is another factor beyond the carrier's control that is hindering compliance with the 95 percent rule.

II. The FCC Must Use a "Good Faith/Diligent Efforts" Test in Applying its Waiver Standard

D.C. Circuit Precedent – Applying the Waiver Standard. As demonstrated above, no carrier could have ensured absolute compliance with the 95 percent rule. No matter how much it spends or the particular efforts it undertakes, beyond a certain point, a carrier's compliance will depend more on customers' willingness to replace existing handsets with new models. Further, the penetration rate requirement was predicated on a predictive judgment of subscriber churn made by the Commission seven years ago, and which actual market realities now prove erroneous. With these circumstances in mind, *WAIT Radio* requires the Commission to provide a meaningful "safety valve" to excuse noncompliance and a "hard look" at any waiver.¹⁵ In *Northeast Cellular*, the D.C. Circuit explained further that the Commission must establish a "rational waiver policy" and avoid decisions that "amount[] to nothing more than a 'we-know-it-when-we-see-it' standard."¹⁶ The Commission has boiled down the court's admonition to a straightforward requirement that "[a]ny grant of a waiver must be based on articulated, reasonable standards that are predictable, workable, and not susceptible to discriminatory application."¹⁷

¹³ See National Emergency Number Association, Fast Facts, <http://www.nena.org/pages/Content.asp?CID=144&CTID=22>.

¹⁴ Alltel has an exemplary record working with PSAPs to deploy Phase II capability in a timely manner – as evidenced by public safety's strong support for Alltel's request for waiver. See Letter to Marlene H. Dortch, Secretary, FCC, from Kathryn A. Zachem, Counsel to Alltel, WT Docket No. 05-287, at 2 n.7 (filed May 24, 2006) ("*May 24 Ex Parte Letter*").

¹⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹⁶ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1164, 1167 (D.C. Cir. 1990).

¹⁷ See, e.g., *Application of AMSC Subsidiary Corporation*, Authorization and Certificate, 11 FCC Rcd 6830, 6833 (IB 1996); *In the Matter of Petition of the Ameritech Operating Companies for Waiver of Part 69 of the Commission's Rules to Establish New 900 Access Service Rate Element*, Order, 10 FCC Rcd 9993, 9993 (CCB 1995) (same).

Here, the FCC's application of its waiver standard to E911 Phase II cases – the requirements set out in the *Fourth MO&O* that a carrier must demonstrate “a clear path to full compliance” and “undertake concrete steps necessary to come as close as possible to full compliance” – in itself is highly subjective at best. Other than a few steps largely relating to early E911 benchmarks,¹⁸ the Commission has not provided any real guidance.

Standing alone, the standard of the *Fourth MO&O* creates the possibility of the type of “we-know-it-when-we-see-it” analysis the D.C. Circuit rejected. However, the *Fourth MO&O* itself suggests a measured approach – in the event an E911 deadline is not met, the Commission “will take into account the extent to which carriers have made concrete and timely efforts to comply and to which their failure to do so was the result of factors outside their control.”¹⁹ In applying its waiver standard to the E-911 handset deployment requirements, moreover, the Commission to date has avoided such a potentially discriminatory route by looking to carriers’ good faith, diligent compliance efforts. In a decision granting Sprint a waiver of the 100 percent new digital handset activation benchmark, the Commission found that, with respect to demonstrating “concrete steps” toward compliance, “Sprint has adequately demonstrated that it took concrete steps necessary to come *as close as reasonably possible* to meeting the deadline,” that “it made very substantial progress toward meeting” the benchmark, and that relief was warranted “[g]iven Sprint’s *demonstration of good-faith efforts*” and the “*general pattern of diligence*” evident in Sprint’s having met other Phase II deadlines.²⁰ The Commission looked to Tier III carriers’ good faith efforts with respect to the interim benchmarks as well,²¹ and with respect to future compliance, held that Enforcement Bureau referral may be warranted where “carriers fail to take the concrete steps necessary to implement, *in good faith*, any revised deployment schedule”²²

The Commission thus evaluates a carrier’s request for waiver of the Phase II requirements based on its good faith efforts and diligence in attempting to comply. Thus, the Commission may not impose a *de facto* strict liability standard by newly applying a subjective, unattainable waiver standard – especially in this case, where the evidence is clear that compliance is beyond a carrier’s control. Further, the D.C. Circuit has also held that “[t]he Commission has an ongoing obligation to monitor its regulatory programs and make adjustments

¹⁸ See *Revision of the Commission's Rules To Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, Fourth Memorandum Opinion and Order, 15 FCC Rcd 17442, 17458 (2000) (“selecting ALI technologies or vendors, timely placing orders for necessary equipment, performing other necessary work.”).

¹⁹ *Id.* at 17458.

²⁰ *Revision of the Commission's Rules To Ensure Compatibility With Enhanced 911 Emergency Calling Systems, Request for a Limited and Temporary Rule Waiver by Sprint Corporation*, Order, 18 FCC Rcd 12543, 12547, 12550 (2003) (emphasis added).

²¹ See, e.g., *Revision of the Commission's Rules To Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, Order, 20 FCC Rcd 7709, 7715 (2005) (“[T]o the extent that a carrier bases its request for relief on delays that were beyond its control, it must submit specific evidence substantiating the claim, such as documentation of the carrier’s good faith efforts....”).

²² *Id.* at 7772.

in light of actual experience,” a policy which applies to consideration of waiver requests as well, where the Commission “cannot blind itself to the exigencies of the truly exceptional case.”²³ A reasoned approach, moreover, does not require that the FCC adopt a “lowest common denominator” approach with respect to granting waivers. It still can account for the public interest objectives underlying the rule by imposing a high good faith/diligent efforts standard for waiver.

As noted, the Commission must also ensure that it avoids a waiver policy “that is susceptible to discriminatory application.”²⁴ Should the Commission grant some waivers of the 95 percent rule and deny others, it must be mindful to avoid any subjective application of the waiver standard. For example, it cannot simply use handset penetration rate as the measure to determine grants and denials, as it has already been established that compliance with the penetration requirement is beyond a carrier’s control. Such an approach fails to recognize individual carriers’ deployment efforts, customer base, and other unique factors. As noted above, moreover, the Commission made clear that for Tier II carriers like Alltel it would look closely at individualized factual circumstances in considering waiver requests of the December 31, 2005 date and other E911 requirements.²⁵ The Commission also must be wary of picking and choosing which carriers’ efforts warrant relief without providing a rational, coherent policy grounded in the Commission’s own precedents. Time and again the D.C. Circuit has made clear that waiver decisions cannot be sustained “when an agency arbitrarily waives a deadline in one case but not in another.”²⁶ As a result, the Commission must apply a good faith/diligent efforts standard to its waiver analysis.

Commission Precedent – Applying the Waiver Standard to E911 Phase II. As demonstrated throughout the record, Alltel has shown “good cause” warranting relief.²⁷ Alltel has demonstrated the “unique or unusual” factual circumstances it faces – namely, a substantial portion of its customer base is long-term and low-usage, and they are resistant to replacing their existing handsets.²⁸ In this case, strict adherence to the rule would be “inequitable” and “unduly burdensome” in light of the extensive efforts identified above.²⁹ Indeed, Alltel had “no reasonable alternative” to meet the December 31, 2005 deadline.³⁰ Further, the “underlying purpose of the rule would not be served ... by application in the instant case,” as PSAP readiness

²³ See *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982) (citing *NARUC v. FCC*, 525 F.2d 630, 638 (D.C. Cir. 1976) and *WAIT Radio*, 418 F.2d at 1157).

²⁴ *Northeast Cellular*, 897 F.2d at 1167.

²⁵ *Phase II Final Waiver Order*, 18 FCC Rcd at 21845.

²⁶ *Mountain Solutions, Ltd., Inc. v FCC*, 197 F.3d 512, 517 (D.C. Cir. 1999) (quoting *Green Country Mobilephone, Inc. v FCC*, 765 F.2d 235, 238 (D.C. Cir. 1985)); see also *Airmark Corp. v. FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985).

²⁷ 47 C.F.R. § 1.3.

²⁸ 47 C.F.R. § 1.925(b)(3)(ii).

²⁹ *Id.*

³⁰ *Id.*

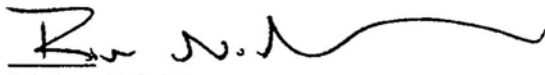
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in Alltel markets is less than half of the extremely low national average.³¹ Finally, the ultimate option to comply with the December 31, 2005 date – turning off non-compliant handsets – would have frustrated the underlying purpose of the rule by eliminating communications entirely during times of emergency. Thus grant of the waiver is in the public interest and warranted here.

* * *

Please contact the undersigned if you have questions or need additional information.

Respectfully submitted,

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³¹ 47 C.F.R. § 1.925(b)(3)(i).